

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EARNEST ADOLF SCHAEF,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

Case No. C05-5461RBL

ORDER DENYING CERTIFICATE
OF APPEALABILITY

This matter comes before the court on the petitioner's Notice of Appeal. Dkt. 26. The court must consider whether to grant or deny the petitioner a Certificate of Appealability. *See* 28 U.S.C. § 2253(c)(3). The court has reviewed the record herein.

PROCEDURAL HISTORY

On February 21, 2006, U.S. Magistrate Judge KAREN L STROMBOM issued a Report and Recommendation, concluding that petitioner's habeas petition was time barred under 28 U.S.C. § 2244(d). Dkt. 23. On February 7, 2006, the court adopted the Report and Recommendation and dismissed the petition with prejudice. Dkt. 22.

Petitioner has now appealed to the U.S. Court of Appeals for the Ninth Circuit.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

The district court should grant an application for a Certificate of Appealability only if the

petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. at 1604.

DISCUSSION

This court dismissed the petition as time barred under 28 U.S.C. § 2244(d). The case was therefore dismissed on procedural grounds. There is nothing in the record that would support a conclusion that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. Moreover, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling. The petition for writ of habeas corpus was untimely, and there is no basis for equitably tolling the one year time limit of 28 U.S.C. § 2244(d).

The Certificate of Appealability should be denied.

Accordingly, it is hereby **ORDERED** that petitioner’s motion for a Certificate of Appealability is **DENIED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party’s last known address.

DATED this 30th day of May, 2006


RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE